In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 509

SUCKOW BORAX MINES CONSOLIDATED, INC., a corporation; MOJAVE BORAX COMPANY, LTD., a corporation; PAUL O. TOBELER, Executor of the Last Will and Testament of John K. Suckow, Deceased, and RUTH E. SUCKOW,

Petitioners,

vs.

BORAX CONSOLIDATED, LTD., PACIFIC COAST BORAX COMPANY, UNITED STATES BORAX COMPANY, AMERICAN POTASH & CHEMICAL CORPORATION, STAUFFER CHEMICAL COMPANY, WEST END CHEMICAL COMPANY, et al.,

Respondents.

Brief of Respondents in Opposition to Petition for Writ of Certiorari

This suit is a companion case to *Burnham Chemical Company v. Borax Consolidated, Ltd.*, 170 F.2d 569. The two suits were instituted by the same attorney, involved the same alleged conspiracy, went through the same courts, and present similar questions. This Court denied certiorari in the *Burnham* case, 336 U.S. 924.

OPINIONS BELOW

The opinion of the District Court is reported in 81 F. Supp. 301, and that of the court below in 185 F.2d 196.

QUESTIONS PRESENTED

Analysis of the petition as a whole shows that it seeks to raise only two questions of law. Both have long been settled against petitioners; neither involves a conflict between circuits. Apart from these two matters, what the petition asks this Court to review consists of the particular facts of the case.

The two questions of law are these:

1. Where the face of a complaint shows beyond doubt that the claim is barred by the statute of limitations or by releases, or where the showing on a motion for summary judgment demonstrates the same conclusion and establishes the absence of any genuine issue of fact on the subject, is a court nevertheless precluded from acting on these legal issues on motion to dismiss or motion for summary judgment, and can these issues be raised only by answers and disposed of by trial?

2. Can a plaintiff in a suit for damages under the anti-trust laws escape the statute of limitations by invoking an alleged continuance of a conspiracy to a time within the statutory period, although every overt act causing damage to him occurred, and his damage had all been sustained, before the statutory period?

STATEMENT

This action was commenced September 11, 1947 (R. 80). It is a treble damage suit under the anti-trust laws based on the claim that petitioners were driven out of the borax business in 1934.

The District Court dismissed the action (R. 623) upon motions to dismiss and motions for summary judgment (R. 441, 446, 452, 461, 682). The court below affirmed the judgment on two independent grounds: (1) That the action was barred by the statute of limitations, and (2) that it was barred by releases (R. 711).

All agree that the period of limitations is three years (R. 711).

Allegations of the Complaint.

The complaint is prolix (R. 3-82), but its essential allegations may be briefly stated:

In 1929 respondents conspired to monopolize and restrain trade in the borax industry, and, as part of the plan, to destroy petitioners' business (R. 52, 80).* In effectuation of the plan a number of acts were performed and various litigation transpired in which respondents obtained several judgments against petitioners (R. 52-65). Finally, in 1934, 13 years before this suit was filed, petitioners ceased to operate or mine any borate properties and ceased to be in business. Petitioner Suckow company's borate properties passed to a trustee in bankruptcy, and in April, 1934, they were leased to one of the respondents (R. 58, 59, para. 83(e)(d)). Petitioners "were destroyed financially and left without means or opportunity further to engage in said borax business or any of its activities in any form whatsoever" (R. 65).

Thereafter, in August, 1934, petitioners and the "Borax Ltd." group of respondents entered into an Agreement of Settlement of all controversies.† By that agreement petitioners agreed to release respondents of "all possible claims" (R. 66). Petitioners did not own their mine outright but were tenants-in-common with Borax Ltd. Part of the settlement was petitioners' agreement to lease their $1/2$ interest to the co-tenant for 10 years on a royalty basis (R. 66-67). In consideration, respondents agreed to pay $150,000 in cash, release various claims, and acknowledge satisfaction of the several judgments already obtained against petitioners (R. 66, 67).

The complaint affirms that "all things were done and performed as called for by said agreement" by petitioners (R. 68, top).

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*In fact, only one petitioner, Suckow Borax Mines Consolidated, Inc., is involved. Petitioner Tobeler is the Executor of John Suckow, but Suckow transferred all his interests in 1929 to Suckow Borax Mines Consolidated, Inc. (R. 51). Petitioner Ruth Suckow is John Suckow's widow (R. 6). There are no allegations connecting the petitioner Mojave Borax Company, Ltd. with the controversy. We shall, however, do as petitioners have done and refer to them as a group.

†Respondents Borax Consolidated, Ltd. (called "Borax Ltd." in the opinion below), Pacific Coast Borax Company and United States Borax Company are affiliated corporations. Respondent Rasor, the testator of respondent Bank of America, and respondents Jenifer and Gerstley were officers or employees of one or more of these corporations.

Thus by the end of 1934 petitioners were completely out of business. All controversies between the parties had been settled. Releases of all claims had been given. Valuable consideration had been paid.

The complaint makes allegations of only the following matters occurring *after* 1934:

Respondent lessee of petitioners' ½ interest in the mine conducted mining operations so incompetently as to cause a cave-in in 1937, ten years before this suit was filed (R. 70, 72). It used shafts and tunnels in the property to remove ore from adjacent property, in alleged violation of the lease (R. 71). In 1942 the lease still had two years to go, and the amount of ore left in the mine and still accessible after the cave-in was less than the tonnage which the lease entitled respondent to extract without further payments, by virtue of its having prepaid royalties (R. 69, para. 86; R. 71, para. 88(a)).

Thereupon petitioners gave to respondents another complete release of all claims, included in the transaction a sale to respondent Borax Ltd. of their interest in the mine, and were paid a consideration of $350,000 cash (R. 73-75).

This transaction was consummated in December, 1942 (R. 75).

Since the vendee already owned half the mine and was the lessee of the other half with the right to extract all remaining ore without further payment, what petitioners sold, in addition to the release, was merely the reversion in their one-half interest in an exhausted mine. The complaint does not allege the value of this empty interest or that it was worth more than respondents paid.

What respondents were buying from petitioners was peace from continued assertion of claims.

By reason of the foregoing facts, all alleged in the complaint, respondents asserted the right to have the suit dismissed on the face of the complaint.

The Showing on the Motion for Summary Judgment.

By motion for summary judgment respondents laid before the court the original releases and settlement papers referred to in the complaint (R. 260 to 423). They also brought before the court certified copies of various official records which showed the following facts:

Repeatedly for years, beginning in 1930, petitioners had been accusing respondents of the very violations of the antitrust laws which constitute the foundation of the present suit. They had done so in solemn form in the numerous lawsuits between the parties.

For example, in January, 1930, John Suckow charged in an affidavit that in 1929 the Borax Ltd. group of respondents, which he called the "Borax Trust," had combined and agreed with the other respondents to raise prices, control and curtail production, and eliminate petitioners as a competitor (R. 86, 93-96). In July, 1930, he and the petitioner Suckow company charged in a verified pleading that respondents were pursuing a plan to prevent petitioners' ore from coming into competition, in order to create a monopoly (R. 130, 135).

In December, 1932, they asserted in a lengthy verified pleading the very accusations made in the instant complaint. They charged a design by the respondents to control production and prices, secure a monopoly and prevent competition, and a conspiracy to eliminate petitioners (R. 156-165). In the same month their counsel charged in open court that respondents' conduct was "part of a plan to throttle competition and create a monopoly * * * to bring about an unlawful and illegal result * * * by destroying or preventing * * * competition * * * by the Suckow Borax Company * * * an absolutely illegal proceeding in direct violation, not only of the policy of the law, but the statutes of the United States" (R. 101, 102).

In July, and again in November, 1933, another counsel for petitioners repeated the charge in open court (R. 104, 167), and again before a Senate investigating committee (R. 228).

In January, 1934, by still other counsel petitioners charged in court that respondents were engaged in a "price fixing and price marketing combination (probably in violation of the Anti-Trust law)" and in "a conspiracy to drive Suckow, its competitor, out of business" (R. 241, 242, 245). A few days later he specified that these acts violated "provisions of Sections 1 to 7 of the Sherman Anti-Trust Law, U.S.C.A. Title 15, pages 4, et seq." (R. 593). Concurrently, by verified petition in another court proceeding, petitioners charged that respondents' acts were carried out to maintain a world-wide monopoly and to suppress the competition of their sole competitors, the petitioners (R. 585, 586).

In April, 1934, petitioners' counsel stated in open court that while these accusations were not relevant to the proceedings then involved, "I claim they are true and I claim those allegations will be proved in the proper proceedings at the proper time" (R. 576, 579).

On July 18, 1934, in yet another lawsuit, petitioners repeated and elaborated all these charges in lengthy and infinite detail (R. 248-260).

The present suit was not filed until more than 13 years later.

ARGUMENT

I.

The Bar of the Statute of Limitations and of Release May Be Raised by Motion to Dismiss Where the Bar Appears on the Face of the Complaint or It May Be Raised by Motion for Summary Judgment Where It Is Shown That There Is No Genuine Issue of Fact.

The first question presented by the petitioners necessarily presupposes, in the case of a motion to dismiss, that the complaint shows on its face that the action is barred, and in the case of a motion for summary judgment, that there is no genuine issue of fact to be tried. Otherwise the motions would in any event be improper. Petitioners' contention that nevertheless the issue may only be raised by answer does not go to substance or merits. It

merely asserts that the Rules of Civil Procedure are so artificial that the fatal defects in a plaintiff's case must be stated in an answer and that the case must go to trial, although there is no question of fact to be tried.

This artificial contention is sought to be based on Rule 8(c), R.C.P. The text writers and commentators point out that the argument misapprehends the meaning of the rule and ignores other rules, such as Rule 9(f), which makes averments of time material in testing the sufficiency of a pleading, and Rule 12(b) as amended in 1946. They all agree that any defense mentioned in Rule 8(c) may be raised by motion to dismiss, if it appears on the face of the complaint, or by motion for summary judgment, if it is shown that there is no genuine issue of fact. 2 *Moore's Federal Practice* (2nd ed.), pp. 1698, 1920, 2257; 1 *Moore* (1st ed.), p. 597; 1 *Barron & Holtzoff, Federal Practice and Procedure* (Rules edition), pp. 509, 510, 522, 523; 3 *Barron & Holtzoff*, pp. 125, 126, 128; *Brown, "Some Problems Concerning Motions under Federal Rule 12(b),"* 3 F.R.D. 146 at 149; *Commentary*, 3 Fed. Rules Serv. 12b.325.

The question has arisen in the Courts of Appeal of 10 of the 11 circuits, and all have reached the same conclusion as the text writers. We list the cases below. In 10 of them this court denied certiorari.

First Circuit:

Keene Lumber Co. v. Leventhal, 165 F.2d 815, 821, on motion to dismiss, statute of frauds.

Second Circuit:

Altman v. Curtiss-Wright Corp., 124 F.2d 177, on motion for summary judgment, release;

Bradley v. American Radiator & Standard Sanitary Corp., 6 F.R.D. 37, affirmed in 159 F.2d 39, on motion to dismiss, illegality;

Nahtel Corporation v. West Virginia Pulp & Paper Co., 141 F.2d 1, on motion for summary judgment, release.

Third Circuit:

Berry v. Franklin Plate Glass Corp., 161 F.2d 184, affirming 66 F. Supp. 863, 865, cer. den. 332 U.S. 767, on motion to dismiss, statute of limitations;

Continental Collieries, Inc. v. Shober, 130 F.2d 631, 635, 636, on motion to dismiss, statute of frauds.

Fourth Circuit:

Barnhart v. Western Maryland Ry. Co. 128 F.2d 709, 714, affirming 41 F. Supp. 898, 904, cer. den. 317 U.S. 671, on motion to dismiss, statute of limitations and laches.

Fifth Circuit:

The question seems not have arisen in the Court of Appeals but a District Court in the circuit has reached the same conclusion. *Grospian v. Pan American Refining Co.,* 6 F.R.D. 453 (S.D. Tex.)

Sixth Circuit:

Berry v. Chrysler Corporation, 150 F.2d 1002, on motion to dismiss, statute of limitations;

Harris Stanley Coal & Land Co. v. Chesapeake & O. Ry. Co., 154 F.2d 450, 455, cer. den. 329 U.S. 761, on motion for summary judgment, statute of limitations;

A. G. Reeves Steel Construction Co. v. Weiss, 119 F.2d 472, cer. den. 314 U.S. 677, on motion to dismiss, statute of limitations.

Seventh Circuit:

Albrecht v. Indiana Harbor Belt R. Co., 178 F.2d 577, cer. den. 339 U.S. 949, on motion to dismiss, statute of limitations;

Anderson & Brown Co. v. Anderson, 161 F.2d 974, on motion to dismiss, failure of consideration;

Anderson v. Linton, 178 F.2d 304, 309, 310, on motion to dismiss, statute of limitations;

Reconstruction Finance Corporation v. Goldberg, 143 F.2d 752, cer. den. 323 U.S. 770, or motion for summary judgment, laches;

Roe v. Sears Roebuck & Co., 132 F.2d 829, 832, on motion for summary judgment, statute of limitations.

Eighth Circuit:

A.B.C. Fireproof Warehouse Co. v. Atchison, T. & S. F. Ry. Co., 122 F.2d 657, on motion for summary judgment, res judicata;

Billings Utility Co. v. Advisory Committee, Board of Governors, 135 F.2d 108, 110, on motion for summary judgment, res judicata;

Brictson v. Woodrough, 164 F.2d 107, 110, cer. den. 334 U.S. 849, on motion to dismiss, statute of limitations;

Eller v. Paul Revere Life Ins. Co., 138 F.2d 403, on motion for summary judgment, res judicata;

Kithcart v. Metropolitan Life Ins. Co., 150 F.2d 997, cer. den. 326 U.S. 777, on motion to dismiss, statute of limitations.

Ninth Circuit:

Burnham Chemical Co. v. Borax Consolidated, Ltd., 170 F.2d 569, cer. den. 336 U.S. 924, on motion for summary judgment, statute of limitations;

Gifford v. Travelers Protective Association, 153 F.2d 209, on motion for summary judgment, statute of limitations.

Tenth Circuit:

Gossard v. Gossard, 149 F.2d 111, on motion to dismiss, statute of limitations;

Panhandle Eastern Pipe Line Co. v. Parish, 168 F.2d 238, 240, on motion to dismiss, statute of limitations;

Sabin v. Home Owners' Loan Corp., 151 F.2d 541, cer. den. 328 U.S. 840, on motion for summary judgment, res judicata.

District of Columbia Circuit:

Lamore v. Laughlin, 159 F.2d 463, on motion for summary judgment, res judicata;

Reynolds v. Needle, 132 F.2d 161, on motion to dismiss,* statute of limitations.

There is no conflict among the circuits. The petition cites only two Court of Appeals decisions, but one is against petitioners and the other is not in point. Thus, in *Jack Mann Chevrolet Company v. Associates Inv. Co.,* 125 F.2d 778 (6 Cir.), the complaint was dismissed on motion, for the very reason that on its face it showed an agreement of release (p. 786, 2d col.). In *Van Sant v. American Express Company,* 169 F.2d 355 (3 Cir.), an answer had been filed and the case had been tried. Thereafter defendant sought to amend the answer to assert the statute of limitations. The court merely held that the statute is waived by not being raised at the first opportunity. It did not hold that it could not be raised in a motion to dismiss or a motion for summary judgment.

Petitioners' remaining citations are of District Court cases. None of them supports or even relates to the contention that the defenses may not be raised by motion for summary judgment.

The contention that the defenses may not be raised on motion to dismiss finds its genesis solely in the fact that after the adoption of the *Federal Rules of Civil Procedure* in 1938 a few district judges misconceived Rule 8(c). But these decisions have been rejected by the Courts of Appeal, including the courts of the circuits wherein the particular District Courts lie, and inconsistency between District Courts and Courts of Appeal is no ground for certiorari. Stern & Gressman, Supreme Court Practice, 104; Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, 576.

These decisions have also been rejected by later decisions of the District Courts.† It may also be noted that there is a swarm

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*The motion was called a motion for summary judgment but rested on the face of the complaint.

†For example, *Dirk Ter Haar v. Seaboard etc. Co.,* 1 F.R.D. 598 (S.D. Cal.) was subsequently rejected at least twice by the very same court in reasoned opinions, *Abram v. San Joaquin Cotton Oil Co.,* 46 F. Supp.

of District Court decisions sustaining motions to dismiss and granting summary judgments based on defenses named in Rule 8(c).*

Some of petitioners' citations are not even relevant, since they are merely cases where the bar of the statute did not appear on the face of the complaint, or there was no showing of the absence of a genuine issue of fact on the motion for summary judgment, e.g., *United States v. Arthur,* 23 F. Supp. 537 (D.C. N.Y.), and *Zimmerman v. Poindexter,* 78 F. Supp. 421 (D.C. Hawaii).

II.

Apart from the Procedural Contention Just Discussed, the Petition Suggests No Reason Why the Judgment Is Not Proper Because of the Releases.

Exactly one month after petitioners had charged respondents at length and in detail with the very violation of the anti-trust

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969; *Wright v. Bankers Service Corp.,* 39 F. Supp. 980, as it has been by the Ninth Circuit, in which this district lies.

The only relatively recent cases cited by petitioners are two by the same judge in the Eastern District of Pennsylvania, *Carlisle v. Kelly,* 72 F. Supp. 326, and *Wilson v. Seas Shipping Co.,* 78 F. Supp. 464, but these are based on *Kraushaar v. Leschin,* 4 F.R.D. 143, by the same court, and *Massachusetts Bonding & Insurance Co. v. Darby,* 59 F. Supp. 175 (W.D. Mo.). The court deciding the case last cited has since held otherwise, *Moffett v. Commerce Trust Co.,* 75 F. Supp. 303. And *Moore's Federal Practice* (Vol. 2, 2d ed., p. 2258, footnote 4), states that *Kraushaar v. Leschin,* supra, was incorrectly decided. The Third Circuit, in which Pennsylvania lies, holds against petitioners' contention, as we have seen.

The other relevant District Court cases cited by petitioners have also been rejected by later decisions of the Courts of Appeal of their own circuits. Compare *United States v. Earling,* 39 F. Supp. 864 (Wisc.) with the three decisions from the seventh circuit cited supra. Compare *Patsavouras v. Garfield,* 34 F. Supp. 406 (N.J.) with the cases from the third circuit cited supra.

*E.g., *Pearson v. O'Connor,* 2 F.R.D. 521 (D.C.); *Hoover v. Lacey,* 80 F. Supp. 691 (D.C.); *Stanley v. Bird,* 85 F. Supp. 358 (W.D. Ky.); *Gerard v. Mercer,* 62 F. Supp. 28 (Mont.); *Kahn v. Cecelia Co.,* 40 F. Supp. 878 (S.D. N.Y.); *Price v. Reynolds Metals Co.,* 69 F. Supp. 82 (E.D. N.Y.); *Sinclair v. United States Gypsum Co.,* 75 F. Supp. 439 (W.D. N.Y.); *Pastor v. American Tel. & Tel. Co.,* 76 F. Supp. 781 (S.D. N.Y.); *Cummings v. Hubbell,* 7 F.R.D. 360 (W.D. Pa.); *Di Sabatino v. Mertz,* 82 F. Supp. 248 (M.D. Pa.); *Statler v. Babcock,* 7 F.R.D. 57 (W.D. Pa.); *Stevens v. Walker,* 61 F. Supp. 441 (W.D. Wash.).

laws to petitioners' damage which they now assert, they gave the 1934 releases (see p. 3, supra). The complaint describes these releases as being "of all possible claims" (see p. 3, supra), and the releases confirm that description (R. 700, 701).

Sweeping releases of all claims were given again in 1942. The total consideration for the several releases was $500,000 cash plus the relinquishment of judgments and claims equal to at least another $500,000.

Although the petition (p. 24) asserts that the courts below passed upon questions of fact bearing upon the validity of the releases, the complaint asserted no such question of fact, the petitioners' affidavits presented none, the petition does not specify any, and in the courts below the petitioners disavowed that there were any. Thus counsel said in the District Court (R. 648-9):

> "There is no attempt to set aside the releases. * * * We do not attempt to set the releases aside in this particular proceeding. This is not an action for that purpose. * * * as I said, we are not attempting to set aside those releases."

And counsel so advised the court below (R. 709).

Consequently, the releases remain and bar recovery.

III.

In Private Suits for Damages for Violation of the Antitrust Laws the Statute of Limitations Is Not Tolled by Alleged Overt Acts Having No Relation to the Plaintiff's Injury.

The petition glides from its artificial procedural contention into an argument that the complaint is not barred on its face and that a summary judgment was not proper on the particular showing of this case.

No one disputes the assertion that all well pleaded allegations of a complaint are to be taken as true for the purposes of a motion to dismiss, and that on a motion for summary judgment the court may only decide whether a genuine issue of fact is presented.

The court below expressly recognizes these principles (R. 707). The real issue which the petition seeks to have the Court review is

whether the principles were correctly applied to the particular facts of this case. Yet this Court has often said that it does not grant certiorari to "give the defeated party in the Circuit Court of Appeals another hearing" on matters peculiar to a particular controversy. *Magnum Import Co. v. Coty,* 262 U.S. 159, 163; *Southern Power Co. v. North Carolina Public Service Co.,* 263 U.S. 508; *United States v. Johnson,* 268 U.S. 220, 227; *General Pictures Co. v. Electric Co.,* 304 U.S. 175, 178.

The decision of the court below is in fact correct, and the only legal question involved is one long ago laid to rest.

The petitioners' alleged damage and the overt acts alleged to have caused it occurred before August 18, 1934. By that time, as the complaint avers, petitioners were out of business, and thereafter they were never in business (p. 3, supra).

The statute of limitations began to run at least as early as 1934. The period of limitations being three years, the claim was barred at least by the end of 1937, 10 years before this suit was brought.

Assuming that the Moratorium Act of October 10, 1942 applied to private claims for damages, only claims for such damages as arose from acts committed after December 1940 could be presented.*

But no such acts and no such damage are alleged or claimed.

The only event after that date to which the complaint refers is petitioners' sale in December 1942 to respondents of the rever-

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*That Act suspended the running of the statute from the date of its enactment to June 30, 1946. More than 14 months elapsed after June 30, 1946 before this suit was commenced, leaving only 22 months available prior to the Moratorium Act.

The petition seems to ask this Court to pass upon the applicability of the Moratorium Act to private damage suits (Petition, pp. 2, 35). But the decision of the court below does not present the question. That court agreed with petitioners' view (R. 712), but decided the case against them on different grounds. We assume that this Court does not grant certiorari to review an abstract legal question or one upon which a petitioner has prevailed below or which is otherwise not relevant to the grounds upon which the case has been decided against him. *McCarthy v. Bruner,* 323 U.S. 673.

sion in their ½ interest in the mine. Petitioners do not allege or claim any damage from this fact (see p. 4, supra). They invoke it merely as showing that the alleged conspiracy "continued" to that time, and they argue that the statute of limitations ought not to run against a claim for damages so long as an alleged conspiracy continues.

This "continuing conspiracy" theory is fallacious and has been rejected by all the authorities. As said in *Momand v. Universal Film Exchange* (1 Cir.) 172 F.2d 37, 49, cer. den. 336 U.S. 967, it is "based on a misreading of the criminal cases." The identical argument was made in *Burnham Chemical Company v. Borax Consolidated, Ltd.*, 170 F.2d 569 (9 Cir.) by the same counsel who represent petitioners here, and this Court denied certiorari (336 U.S. 924). Counsel twice sought a rehearing, which was twice denied (336 U.S. 955, 337 U.S. 961). The present petition is another attempt by the same counsel to have this Court reopen a settled rule.

Without exception the authorities hold, with respect to private suits for damages, that the statute of limitations runs against overt acts as they occur and cause damage, and that the continuing conspiracy theory of the criminal cases is inapplicable. In addition to the cases already cited, we may note *Bluefields S. S. Co. v. United Fruit Co.*, 243 Fed. 1, 20, appeal dismissed 248 U.S. 595; *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F.2d 742 (9 Cir.), cer. den. 299 U.S. 613; *Twin Ports Oil Co. v. Pure Oil Co.*, 119 F.2d 747 (8 Cir.), cer. den. 314 U.S. 644; *Glenn Coal Co. v. Dickinson Fuel Co.*, 72 F.2d 885, 888, 890 (4 Cir.); *Strout v. United Shoe Machinery Co.*, 208 Fed. 646; *Sidney Morris & Co. v. National Association of Stationers*, 40 F.2d 620 (7 Cir.); *Alexander Milburn Co. v. Union Carbide & Carbon Corp.*, 15 F.2d 678, 680 (4 Cir.); *Midwest Theatres Co. v. Cooperative Theatres*, 43 F. Supp. 216, 220; *Leonard v. Socony Vacuum Oil Co.*, 42 F. Supp. 369, 370; *Twin Ports Oil Co. v. Pure Oil Co.*, 46 F. Supp. 149, 152.

Contrary to its gratuitous assertion that there is conflict, the petition cites no decision of any court in support of its conten-

tior Its citations are all criminal cases,* and the question involved in such cases is essentially different. So long as there is a conspiracy continuing to a time within the period of limitations, there is a punishable crime, a wrong against the public which the government may vindicate, whether or not any specific person is injured. But a treble damage suit is not brought to vindicate the law. The gravamen of such an action is not the wrong to the public but the damages suffered by the plaintiff. These can only flow from overt acts. While the acts acquire the taint of illegality because of the conspiracy, the private plaintiff's right to recover is based on the acts done, and it is for the damage to him that he recovers. It is of no concern to him that a punishable conspiracy continues or that overt acts are done unless they occasion damage to him.

PETITIONERS' REMAINING ARGUMENT ABOUT THE STATUTE OF LIMITATIONS RESTS ON ERRONEOUS ASSUMPTIONS.

The petition does not present to this Court any other legal question and its remaining discussion is vitiated by the fact that it rests on certain false but tacit assumptions.

Thus it asserts that petitioners did not "discover" their claim until 1944. The state statute of limitations applies to private suits under the anti-trust laws.† And the applicable statute is not tolled by lack of knowledge; the running of the statute is not deferred until "discovery." *Burnham Chemical Company v. Borax Consoli-*

*The petition (at pp. 28, 30) cites *Albert Pick-Barth v. Mitchell, etc. Co.*, 57 F.2d 96, as a civil case in point. But that case involved no question of the statute of limitations. The very passage quoted in the petition shows the distinction between criminal cases and civil actions for damages. It states that to constitute an offense under the Sherman Act it is not necessary to show an overt act but that in order to create a private cause of action for damages there must be overt acts.

†*Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390; *Cope v. Anderson*, 331 U.S. 461, 466; *Burnham Chemical Company v. Borax Consolidated, Ltd.*, 170 F.2d 569 (9 Cir.), cer. den. 336 U.S. 924; *Momand v. Universal Film Exchange*, 172 F.2d 37 (1 Cir.), cer. den. 336 U.S. 967; *Williamson v. Columbia Corporation*, 110 F.2d 15 (3 Cir.), cer. den. 310 U.S. 639.

dated, Ltd., supra; *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F.2d 742 (9 Cir.), cer. den. 299 U.S. 613; *State of Oklahoma v. American Boo' Company*, 144 F.2d 585 (10 Cir.).

"Fraudulent concealment" will toll the statute, but a complaint seeking to toll a statute on that ground must allege facts showing fraudulent concealment and may not merely assert the conclusion. *Burnham Chemical Company v. Borax Consolidated, Ltd.*, supra, and cases cited in footnote 16 in that case. Here, as the court below observes, the complaint does not allege any such facts (R. 716, 717). Nor does the petition claim that it does.

Moreover, quite apart from the pleading, the showing on the motion for summary judgment demonstrated that there was no genuine issue on the subject. It was shown that for years petitioners had been accusing respondents of the very violation of the antitrust laws to petitioners' damage upon which they rest their present complaint (see pp. 5, 6, supra). One who has publicly asserted that he has a claim obviously has no standing to say that he lacked awareness of it at the time of his assertion or that its existence was concealed from him.

Respondents' showing did not consist of statements by any affiant either testimonial in character or susceptible of conflict. The affidavits were merely vehicles to lay before the court certified copies of documents which were themselves the public assertion by petitioners of their claim. In their very nature they were not controvertible, nor were they denied by petitioners.*

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*The contrary assertion in the petition (pp. 4, 5) is unfounded. As observed by the court below (R. 702), petitioners' principal affidavit was introduced to show the existence of the alleged conspiracy, not to disprove the genuineness of the facts and documents produced by respondents. Moreover, that affidavit is based on information and belief (R. 467) and therefore did not comply with R.C.P. Rule 56(e). The gist of the petitioners' other two affidavits is that when they made their accusations against respondents in 1933, they were without sufficient evidence to prove their charges. This is no answer to the fact that the making of the accusations shows that there was no fraudulent concealment of their claims.

Petitioners also argue that their accusations of earlier years charged that the conspiracy under which respondents committed the acts to petitioners' damage was formed in 1927, not 1929. Even if true, this would be pointless, since the date when the alleged conspiracy was formed has no bear-

THE REFUSAL OF THE COURT OF APPEALS TO REVERSE THE JUDGMENT BECAUSE THE DISTRICT COURT DECLINED TO VACATE IT TO PERMIT THE COMPLAINT TO BE AMENDED A THIRD TIME PRESENTS NO GROUND FOR CERTIORARI.

The petitioners complain that the District Court refused to vacate its judgment in order to permit amendment of the complaint. The complaint had already been amended twice before, and petitioners did not submit a proposed amendment or disclose the nature of the amendment they wished to make. They have never done so; they do not do so now.

Whether a court, after granting a motion to dismiss or entering judgment, should grant leave to amend rests in its sound discretion, *Aetna Casualty & Surety Co. v. Abbott,* 130 F.2d 40, 44 (4 Cir.); *Ledbetter v. Farmers Bank & Trust Co.,* 142 F.2d 147, 149 (4 Cir.); *Young v. Garrett,* 159 F.2d 634 (8 Cir.); *Laughlin v. Garnett,* 138 F.2d 931 (D.C. Cir.), which it does not abuse by refusing to permit a third amendment, *Laughlin v. Garnett,* supra, or one which would avail nothing, *Stephens v. Reed,* 121 F.2d 696 (3 Cir.), or, *a fortiori,* one whose nature is not disclosed, *Maloney v. Hammond,* 176 F.2d 780 (9 Cir.); *Lilly v. U. S. Lines,* 42 F. Supp. 214; *Schwab v. Nathan,* 8 F.R.D. 227.

In *Markert v. Swift & Co.,* 173 F.2d 517, invoked by petitioners, there had been no previous amendment and the motion was accompanied by a "proffered amended complaint" (p. 519) which the court was able to review (p. 520).

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ing on "fraudulent concealment," and the statute of limitations begins to run from the date of the acts and damages caused thereby, not from the date when the conspiracy was formed. In fact, in January 1930 petitioners by affidavit accused respondents of a conspiracy formed in 1929 (see p. 5, supra), and the original complaint herein alleged that the 1929 agreement was nothing but a reduction to writing of previous conspiracies (R. 38, para. 73).

CONCLUSION

This case involves no conflict with any other circuit nor any important question of federal law which has not long been settled by this Court.

We respectfully submit that the petition for writ of certiorari should be denied.

Dated: February 19, 1951.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 509

SUCKOW BORAX MINES CONSOLIDATED, INC., a corporation; MOJAVE BORAX COMPANY, LTD., a corporation; PAUL O. TOBELER, Executor of the Last Will and Testament of John K. Suckow, Deceased, and RUTH E. SUCKOW,

Petitioners,

vs.

BORAX CONSOLIDATED, LTD., PACIFIC COAST BORAX COMPANY, UNITED STATES BORAX COMPANY, AMERICAN POTASH & CHEMICAL CORPORATION, STAUFFER CHEMICAL COMPANY, WEST END CHEMICAL COMPANY, WESTERN BORAX COMPANY, LTD., GOLDFIELDS AMERICAN DEVELOPMENT COMPANY, PACIFIC ALKALI COMPANY, F. LESSER, JAMES M. GERSTLEY, FRANK M. JENIFER, P. C. BANKER, ALLEN W. ASHBURN, WALTER A. MOSES, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION as Executor of the Last Will and Testament of Clarence McAnisse Rasor, Deceased, BEN H. BROWN, as Special Administrator of the Estate of Victor C. Emden, Deceased, et al.,

Respondents.

Reply of Petitioners to Brief of Respondents In Opposition to Petition for Writ of Certiorari

Counsel state that this action is a companion suit to *Burnham Chemical Company v. Borax Consolidated Ltd., et al.* **Such is not the fact.** In the *Burnham* case, which was also a treble damage action involving certain of the present respondents, such respondents made similar motions

to dismiss based upon the statute of limitations and for summary judgment as appear herein. There the similarity between the two cases ended. In the *Burnham* case, the Motion to Dismiss and the Motion for Summary Judgment were **denied** by the trial Court upon the ground of conflicting evidence appearing in the motion for summary judgment, as should have been the finding in this case. Thereupon, respondents filed an answer urging the statute of limitations and various other defenses. **The matter then went to trial before a jury.** The overt acts in the two cases were entirely different. At the conclusion of petitioners' case a motion for a directed verdict was made and ultimately was granted by the trial court on the ground of the statute of limitations. The Moratorium Act referred to on page 35 of the petition herein was not in force at the time of the performance of the acts complained of in the *Burnham* case. In the present case, the District Court, in spite of the many questions of fact which were passed upon and decided on the motion for summary judgment (see our Opening Brief in the Circuit Court, pages 51 and 52, for a statement of such questions of fact), granted the motion for summary judgment and dismissed this action. No trial upon the merits, as in the *Burnham* case, was afforded petitioners herein; instead, the District Court boldly took the case over on a motion for summary judgment and attempted to dispose of the whole case on what it thought should have been the law *and the facts*. In doing so, every fundamental rule of this and the Circuit Courts involving the presentation of motions to dismiss and for motions for summary judgment was disregarded or overruled.

QUESTIONS PRESENTED

On page 2 of their brief, Counsel allege that there are only two questions of law involved herein. **Such statement is not correct.**

The principal questions here presented are as follows:

1. Whether or not Rule 8(c) as to the pleading of the Statute of Limitations means what is says, and whether or not the District Courts are at liberty to interpret such Rule as they might deem convenient at the moment. No qualifications of such Rule are set forth therein and none of the other rules, referred to by counsel, modifies in any respect the direct and unqualified provisions of Rule 8(c) which, speaking for itself without qualifications or limitations, is the law of the land following its adoption by this Court. As a result of the rulings of some of the lower courts cited by Counsel, the present situation is confusing and uncertain, this Court never having passed on the question here presented. This case brings such question directly before this Court and we respectfully request this Honorable Court to accept the case and definitely and finally lay down the true meaning and effect of the Rule.

2. The two releases allowed by the lower courts to be urged herein contrary to such Rule 8(c) present the same questions involved in that of the statute of limitations and above set forth.

3. The right of the trial court to proceed with the motion for summary judgment when such motion and the affidavits offered in support of them indicate and show that questions of fact are to be determined

thereon. The presence of a question of fact alone, irrespective of the views of the Court thereon, is the determinative factor (*Frederick Hart & Co. v. Recordgraph, etc.*, 169 F.(2) 580, 581).

4. The important question as to what constitutes the **"gravamen"** of such a treble damage anti-trust action as the present. This Court has indicated that the "conspiracy" constitutes such gravamen and not the overt acts arising thereunder (see decisions of this and other Federal courts, pages 25 et seq., Petition for Certiorari). Such is a very important question and we respectfully submit that the Rule in connection therewith should be laid down by this Court. Now that these treble damage anti-trust actions are increasing in number, we submit that it would be advisable, and of great assistance to the profession and litigants, that this Honorable Court definitely establish a rule governing the question.

5. In such actions as the present, when does the Statute of Limitations begin to run—from the date of each overt act or from the last overt act committed pursuant to the main conspiracy? This Court has twice expressly laid down the rule that the statute does not begin to run until the performance of the last overt act "and this although some of the earlier acts may have occurred more than three years before the indictment was found." *Fishwick v. United States*, 329 U.S. 211; 67 S.Ct. 224; *Brown v. Elliott*, 225 U.S. 392; 32 S.Ct. 812.

In spite of these direct rulings, some of the lower Federal courts, including the 9th Circuit in the present case, have ignored the rule so established by this Court and have held to the contrary.

6. **Is there any distinction between civil and criminal cases as to the rule for the commencement of the running of the statute of limitations?** Counsel and some of the circuit courts lay much stress on such a distinction, but we submit that there is no such distinction, fundamentaiiy or otherwise, or by any ruling of this Court. So far as we can determine, this Court has never passed directly upon this question. The same is presented squarely and directly herein and we respectfully request a ruling thereon. The *Albert Pick-Barth Co.* case, appearing on page 28 of the Petition, holds to the contrary and applies the doctrine to a civil action. In that case certiorari was denied by this Court.

7. The position of the Moratorium Act and its application to the present facts (Petition for Certiorari, page 35; Counsel's Reply, page 12).

AS TO "THE SHOWING ON THE MOTION FOR SUMMARY JUDGMENT" (P. 5)

Here Counsel attempt to bring into being issues not involved herein. **This case is based solely upon a conspiracy which arose in 1929** but which was not discovered by Petitioners until the facts of its creation were exposed by both an indictment secured by the United States Government and through a civil proceeding brought against most of these Respondents in September of 1944. Previously to such time, no knowledge existed of such 1929 conspiracy—denominated the "General Conspiracy" in the complaint, record and petition for certiorari on file herein. Long prior to 1944, Respondents had been exercising all of their power and wealth to eliminate Petitioners from competition in

the borax field. During that time it was always thought that the American Potash & Chemical Corporation, one of Respondents, was a British controlled corporation together with the Borax Consolidated, Ltd., and Pacific Coast Borax Company. During World War II, however, this Government discovered that all of the stock of the American Potash was, in fact, controlled by enemy aliens, whereupon the Government seized the books and records of such Company in this country and as a result the "General Conspiracy" of 1929 was disclosed; thereupon it became apparent to Petitioners that the basis for the many wrongs inflicted upon them by Respondents was such 1929 conspiracy.

On the motion for summary judgment Respondents filed various affidavits which they contended showed knowledge on the part of Petitioners of the anti-trust activities of Respondents, referring to various documents which indicated, so they contended, general knowledge by Petitioners of such violations of the anti-trust law by Respondents. This claim was denied by affidavits filed by Petitioners, alleging and claiming that this action was based solely on the "General Conspiracy" of 1929 and that all references by Petitioners to anti-trust activities by Respondents referred to conspiracies and activities existing before the '29 conspiracy, and contending that Petitioners had no knowledge of such '29 conspiracy until the commencement of the Government proceedings against Respondents in San Francisco in 1944. Thus, questions of fact at once arose which required the District Court to deny the Motion for Summary Judgment and to send the case to trial on such facts. The failure to do so was gross error and directly contrary to the rulings of this Court.

We submit that it is the right of a plaintiff to determine his cause of action and the Court should not permit the change of the same (the 1929 conspiracy above) without the consent of plaintiff. The situation presented here is the same as though Petitioners held 10 promissory notes from a group of defendants all growing out of the same transaction and to 7 of which defendants might have urged certain defenses. Instead of suing upon all of the 10 notes, plaintiff elected to sue upon the 9th note, to which there was no such defense, whereupon defendants pleaded such defenses it had to the 7 notes. That, of course, could not successfully be done. We respectfully submit that the situation here is the same; because Petitioners may have various causes of action against Respondents arising from different conspiracies violating the anti-trust laws this does not prevent Petitioners from selecting any one of such conspiracies as the basis of an action. Counsel's reference to the '29 Conspiracy is only incidental—only for the purpose of confusing the case and issues—or in an endeavor to lead the Court to the belief that Petitioners have sued generally on all of the wrongs inflicted upon them by Respondents and performed pursuant to various and many conspiracies. Their attempt to do so has confused the lower courts and has brought them favorable results. Neither of the lower courts has made the distinction urged here as to the separability of the '29 Conspiracy and the fact that this action is based wholly and solely upon such '29 conspiracy. The Circuit Court in its opinion recognizes to a degree the existence of such fact, but after such recognition proceeds to ignore it.

Our insistence on this point is important for the affidavits in support of the motions to dismiss contain no allega-

tions or claims that Petitioners made any references whatsoever to the '29 conspiracy in their charges against Respondents of anti-trust activities. Thus questions of fact at once came into being and required the dismissal of the motions.

AS TO THE ARGUMENT OF COUNSEL

I.

Here Counsel Claim That the Bar of the Statute and of Release May Be Raised by Motion to Dismiss Where the Bar Appears on the Face of the Complaint or It May Be Raised by Motion for Summary Judgment Where It Is Shown That There Is No Genuine Issue of Fact.

In support thereof counsel cite cases from various circuits in which it is claimed that the statute was allowed to be urged on the motion to dismiss. Also it is said that the text writers and commentators do not agree with the wording of the Rule or with the action of this Court in its pronouncement. This demonstrates the confusion as to the points presented and the necessity of this Court taking over this controversy and definitely deciding the questions at issue pursuant to Sup. Ct. Rule 38, Subs. 2 and 5b. Without such determination on the part of this Court, the confusion now existing between the various circuits would increase as the years pass to the point where the right to urge the statute of limitations would rest in the whim of the trial court. No better illustration of the necessity of the removal of this confusion by this Court could be presented than the argument made by counsel between pages 6 and 11 of their reply. Rule 8(c) undoubtedly was adopted in its present form, both as to the statute of limitations and as to release, due to the many questions of fact which could or would arise in the course of time on such pleas and motions

and to the unfairness which would result therefrom in denying to plaintiffs the right of cross-examination. Such would also constitute a running rampant of the hearsay rule and in time the doing away in part at least with the jury trial.

II.

Here Counsel Claim "That Apart from the Procedural Contention * * * the Petition Suggests No Reason Why the Judgment Is Not Proper Because of the Releases." (P. 11)

A complete answer to this contention is contained in the petition, page 21 E, to which reference is hereby made. In the reply counsel contend that the cash paid upon receipt of such releases constituted payment for the relinquishment of petitioners' claims. Such is not the fact for a large part of the money so paid was for land purchased by Respondents from Petitioners (Petition page 22).

At no time prior to the sale of 1942 were Petitioners completely out of business. Although they had suspended the mining and shipping of borax ore by 1942 they were, nevertheless, collecting royalties under the lease and had every expectation and intention of resuming their former activities upon the expiration of such lease. This they were prevented from doing by the threat of Respondents to exhaust the mine, to refuse to turn it back, and to the inadequacy of the mining explorations carried on by Respondents (R. 71-74). The constant pressure of Respondents upon Petitioners to consent to renew the lease, to sell out, and to retire from the business in toto was exactly similar and with the same effect as the occupational disease presented in the case of *Yuri v. Thompson*, 337 U.S. 163; 69 S. Ct. 1018, and cited on page 36 of the Petition.

Counsel also claim under this heading that the Petitioners have not presented facts arising on the giving of the releases. Such statement is incorrect. The District Court proceeded to find on the facts in part as follows: See Record (p. 620), where the trial court stated:

> "In every transaction with the defendant the plaintiffs have received consideration or adjudication of their rights by a court having jurisdiction."

Another direct finding of fact appears in the Record (p. 619), where the trial court directly refers to a fact presented and holds that "such fact precludes plaintiffs from availing themselves of this exception, etc." Both of such statements constitute findings of fact by the trial court as fully and to all intent and purposes as though the case had been tried upon the merits and it had found from the evidence presented by both sides as set forth in such quotation. This was pure error. *Frederick Hart & Co. v. Recordgraph Corp.*, 169 F.(2) 580 (Third Circuit), covers this situation exactly. See page 583 where the court said:

> "The foregoing clearly establishes the *existence of a fact issue* with respect to what was actually said by Murry to Weber. It was at that point that the District Court's consideration should have terminated and Recordgraph's motion denied. Instead, the District Court proceeded to *decide* the fact issue and thereby committed error under the applicable principles of law stated earlier in this opinion. It is immaterial that it *decided* the fact issue in Recordgraph's favor—the point is that it went beyond its province to resolve any fact issue on a motion to dismiss or for summary judgment. *Cf. Sarnoff v. Ciaglia,* 3 Cir., 1947, 165 F.2d 167." (Court's italics.)

For further illustrations of the facts involved see Petition, pages 19 and 20.

Counsel are correct in stating that this action is not an attempt to set aside the releases. Instead it is a straight treble damage action, in which the forcing of such releases from Petitioners constituted overt acts pursuant to the 1929 conspiracy.

III.

Counsel Cannot in Good Faith Contend That the Affidavits Used on the Motions for Summary Judgment Did Not Create Questions of Fact and the Same Applies to Such Affidavits so Far as They Affect the Motion Based on the Statute of Limitations.

As is shown, supra, and in the Petition, many questions of fact arose, and the action of the lower courts in permitting the trial of the cause upon affidavits is contrary not only to the decisions of this Court but to various other circuits as well. It is also contended that the statute began to run as early as 1934 and that the claim was barred by the end of 1937. Such is not the fact, for the allegations here show without doubt a continuing conspiracy. On page 14, it is contended that the "continuing conspiracy" point is fallacious and has been rejected by all the authorities, completely ignoring the decisions of this Court in *United States v. Kissell,* 218 U.S. 601, cited in the petition on page 31, and *Brown v. Elliott,* 225 U.S. 392, likewise cited on page 33 of the petition. Also—

Fishwick v. United States, 329 U.S. 211;
Braverman v. United States, 125 F.(2) 283;
Heederly v. United States, 193 F. 561 (9th Cir.);
United States v. McWilliams, 54 F. Sup. 791.

To escape such rules, counsel contend that the cases cited by Petitioners are all criminal cases where the rule is dif-

ferent from that in civil cases. **BUT NOT ONE CASE IS CITED BY COUNSEL WHICH HOLDS TO SUCH EFFECT**; nor is there any suggestion as to why such distinction shoud exist, except the statement on page 15 where it is claimed that a criminal proceeding is a wrong against the public and is a punishable crime. How or in what respect does that differentiate the character of cases? Neither the Anti-trust Act nor any of its provisions make any such distinction. There never has been a decision of this Court, so far as we have been able to ascertain, making any such distinction. There is no reason for such distinction, for the acts prohibited are specifically made punishable both by criminal proceedings and by civil actions for damages on the part of the individuals who have been damaged. The reference to the Burnham case merely demonstrates that this Court did not accept the distinction urged by counsel for Respondents then acting but decided to leave the point open for a more propitious time. We respectfully submit that such time has now arrived.

AS TO THE CLAIM THAT PETITIONERS' ARGUMENT ABOUT THE STATUTE OF LIMITATIONS RESTS ON ERRONEOUS ASSUMPTIONS. (P. 15)

It is a cardinal rule that when a person has been damaged by the illegal actions of other parties and when the activities of such other parties are fraudulently concealed from the injured party, the statute does not begin to run until the discovery of the truth. Such is the principle involved here, for Respondents deliberately conspired against Petitioners and thereafter fraudulently concealed such activities. A conspiracy to ruin one financially is certainly a fraud against such party, and if damage results thereby why

should not the injuring parties be compelled to respond in damages when their activities finally have been discovered by the injured party, irrespective of a period of time or within a designated statutory period thereafter. Why should time excuse wrong-doing when the same has been deliberately concealed—and why should the aid of the courts be expected, as Respondents here do, when their wrongdoing has caused great damage to Petitioners? It is only when an injured party has slept on his rights in not having used opportunities presented to him to discover the reason of the wrongs inflicted upon him that the law punishes him for such neglect on his part. Here the facts show that Petitioners were grievously injured. Such fact is not denied by the Respondents, in fact, all of the allegations of the complaint on these motions are admitted, and we respectfully submit that Petitioners are entitled, under the rules of law now existing, to a trial on the merits of their cause.

The Concluding Contention of Counsel's Argument Is That the Refusal of the Court to Vacate the Order Granting the Dismissal Presents No Grounds for Certiorari.

This contention is based entirely on a wrong assumption, namely, that the Petitioners directly asked permission to file an amendment to the complaint. This is not correct as shown in the petition (p. 37), *for the motion was to amend the order of dismissal permitting Petitioners to file an application to amend.* We respectfully refer to page 37 of the petition as a complete answer to counsel's contention.

AS TO THE MORATORIUM ACT

No discussion of this important point appears in the brief of counsel. We believe that such Act is controlling herein and inescapable when applied to this cause. We again re-

spectfully refer to Subdivision (1) of the Petition covering such Act and appearing at pages 35 et seq. of the Petition. The contention that there were no overt acts subsequent to and between 1934 and 1942 is wholly refuted by such Subdivision (1) on such page 35.

CONCLUSION

We earnestly believe that this cause directly presents many outstanding questions now involved in uncertainty and which call for the final voice of this Court. Important litigation in the field of treble damage anti-trust actions lie before our people for which reason it would appear advisable to settle as many of them as possibly can be properly handled in advance by the final determination of this Court. It appears to us that this cause presents clearly and definitely a fortuitous grouping of points now left in uncertainty and that it would be of great benefit, not only to the profession but to succeeding litigants, that this court take this cause for its consideration and point out the paths of the future.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1950

Office-Supreme Court
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No. 509

SUCKOW BORAX MINES CONSOLIDATED, INC., a corporation; MOJAVE BORAX COMPANY, LTD., a corporation; PAUL O. TOBELER, Executor of the Last Will and Testament of John K. Suckow, Deceased, and RUTH E. SUCKOW,

Petitioners,

vs.

BORAX CONSOLIDATED, LTD., PACIFIC COAST BORAX COMPANY, UNITED STATES BORAX COMPANY, AMERICAN POTASH & CHEMICAL CORPORATION, STAUFFER CHEMICAL COMPANY, WEST END CHEMICAL COMPANY, WESTERN BORAX COMPANY, LTD., GOLDFIELDS AMERICAN DEVELOPMENT COMPANY, PACIFIC ALKALI COMPANY, F. LESSER, JAMES M. GERSTLEY, FRANK M. JENIFER, P. C. BANKER, ALLEN W. ASHBURN, WALTER A. MOSES, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION as Executor of the Last Will and Testament of Clarence McAnisse Rasor, Deceased, BEN H. BROWN, as Special Administrator of the Estate of Victor C. Emden, Deceased, et al.,

Respondents.

Petition for Rehearing After Order Denying Certiorari

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 509

SUCKOW BORAX MINES CONSOLIDATED, INC., a corporation; MOJAVE BORAX COMPANY, LTD., a corporation; PAUL O. TOBELER, Executor of the Last Will and Testament of John K. Suckow, Deceased, and RUTH E. SUCKOW,

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vs.

BORAX CONSOLIDATED, LTD., PACIFIC COAST BORAX COMPANY, UNITED STATES BORAX COMPANY, AMERICAN POTASH & CHEMICAL CORPORATION, STAUFFER CHEMICAL COMPANY, WEST END CHEMICAL COMPANY, WESTERN BORAX COMPANY, LTD., GOLDFIELDS AMERICAN DEVELOPMENT COMPANY, PACIFIC ALKALI COMPANY, F. LESSER, JAMES M. GERSTLEY, FRANK M. JENIFER, P. C. BANKER, ALLEN W. ASHBURN, WALTER A. MOSES, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION as Executor of the Last Will and Testament of Clarence McAnisse Rasor, Deceased, BEN H. BROWN, as Special Administrator of the Estate of Victor C. Emden, Deceased, et al.,

Respondents.

Petition for Rehearing After Order Denying Certiorari

To The Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners herein, very respectfully and earnestly, urge that this Honorable Court grant certiorari in this cause,

in order that serious contradiction between various Circuits and this Court, as well as between such Circuits, and involving the question of the Statute of Limitations in Anti-trust Treble Damage actions be definitely decided by this Court to the end that exact Rules applicable thereto be laid down. As the situation now stands different rules on the points involved in this cause exist and are applied in the various Circuits, some of which are directly contrary to the decisions of this Court.

This particular cause squarely presents various basic questions involved now in the fog of geographic uncertainty and presents the opportunity of lighting a pathway with the truth for all to follow.

QUESTIONS DECIDED HEREIN BY THE NINTH CIRCUIT, AND EITHER DIRECTLY CONTRARY TO THE RULINGS OF THIS COURT OR TO THOSE OF OTHER CIRCUITS.

I.

The Circuit Court held that on a motion to dismiss or for supplementary judgment, the defendants could plead the "statute of limitations" and "release." **This is directly contrary to Rules of Civil Procedure, Rule 8(c) expressly stating that such pleas must be advanced as affirmative defenses.** We do not find that this Court has ever passed upon such questions other than by the creation of such rule itself, but we do find that many District Courts and some Circuit Courts have held directly contrary to the rule announced by the Ninth Circuit in this cause. **Directly contrary to such holding of the Ninth Circuit is that of Van Sant v. American Express Co., 169 F.(2d) 355 (Third Cir.), where it is stated (p. 372):**

> **"We see no justification for appellee's request to be permitted at this time to set up the Pennsylvania one year statute of limitations in its amended answer. That statute is an affirmative defense and must be pleaded. Rule 8(c) Federal Rules of Civil Procedure. Since it has not been pleaded it is waived under Rule 12(h)."**

A like rule also has been established by various district courts throughout the country, as shown in our petition for a writ of certiorari, (pages 9, et seq.) Contrary Circuit Court opinions are *Anderson v. Linton,* 178 F.2d 310 (7th Cir.), and another case from the same Circuit, namely, *Albrecht v. Indiana, etc.,* 178 F.2d 577 (7th Cir.). Accordingly, we now find the holding of the Ninth Circuit to be supported by another Circuit Court and some District Court rulings, *while the rule as established by the Ninth Circuit is directly contrary to the Van Sant case, supra, and many District Court rulings.* As stated on page 8 of the petition for certiorari, the confusion now existing is stated in 173 A.L.R. 361 and would seem to bring the matter definitely and strictly within Rule 38 of this Court, particularly Subdivision 2 and 5(b).

The question of the statute of limitations is a most important one and if it is possible to cut off and terminate a plaintiff's rights on a plea of the statute made on a motion to dismiss or for summary judgment, this Court, we respectfully submit, should tell us so and advise us of such amendment, in effect, of such Rule 8(c) of R.C.P.

Cannot this Court now be persuaded to rule definitely on this point and establish the true rule for all to follow?

II.

The Ninth Circuit held that the statute of limitations in a conspiracy case begins to run from the date of each overt act (R. p. 713).

Such is directly contrary to the rule laid down by this Court in

Fiswick v. United States, 329 U.S. 211, 67 S.Ct. 224;
Brown v. Elliott, 225 U.S. 392, 32 S.Ct. 812; and
Albert Pick-Barth v. Mitchell, 57 F.2d 96 (cert. den.) 286 U.S. 552.

III.

The Ninth Circuit held that the conspiracy in a cause of this kind is not the gravamen of the action (Op. p. 713). Such holding is directly contrary to the rule previously announced by this Court.

Nash v. United States, 229 U.S. 373, 33 S.Ct. 780;
United States v. Socony, Etc., 310 U.S. 150, 60 S.Ct. 811;
Chattanooga Foundry, Etc. v. Atlanta, Etc., 203 U.S. 390; 27 S.Ct. 65;
Albert Pick-Barth Co. v. Mitchell, Etc., 37 F.2d 96 (cert. den.) 286 U.S. 552;
United States v. General Motors, 121 F.2d at 404;
United States v. New York, Etc., 137 F.2d 459 (cert. den.) 320 U.S. 783.

The Ninth Circuit escapes all of these decisions, except the Pick-Barth case, upon the ground that they were criminal cases (Op. R. 713). This question of a distinction between civil and criminal cases never has been passed upon by this Court; its importance in this class of cases would seem to call for the determination of a definite rule thereon.

IV.

The complaint definitely charges on a conspiracy of 1929. Such charges are fully set forth in the complaint commencing with Par. 69 (R. 80 and 82) and continue through paragraphs 76, 77 and 78. Such charges are full and explicit and are admitted on these motions by respondents, as the activities of such conspiracy were continued until the final settlement in December 1942. So that the statute did not commence to run until such date. The Circuit Court completely ignored this point in its Opinion although petitioners urged that the statute of limitations did not begin to run until the last overt act under such conspiracy, which was the settlement agreement of 1942.

This Court has definitely ruled several times that in such a continuing conspiracy the statute does not begin to run until the last overt act was performed in pursuit thereof.

United States v. Kissel, 218 U.S. 601;

Brown v. Elliott, 225 U.S. 392, 32 S.Ct. 812.

Herein the Ninth Circuit has expressly held contrary to such rulings of this Court.

V.

Throughout this cause petitioners have claimed that as long as questions of fact were presented upon the motions to dismiss and for summary judgment presented herein it became the duty of the Trial Court to deny the motion and send the cause to trial. Instead of so doing the Trial Court (also the Circuit Court) herein passed upon many questions of fact, some of which are referred to in the Opinion of the Circuit Court (R. 707-9). **That questions of fact arose on these motions and were submitted and considered by the**

lower Court is admitted in the Opinion (R. 707-8), but are passed over in a discussion of the facts themselves. This ruling is directly contrary to many rulings of this Court and those of other Circuits, to the effect that as soon as questions of fact arise the motions must at once be denied. *Sartor v. Arkansas, Etc.,* 321 U.S. 620, 64 S.Ct. 724, and cases cited.

Also,

Frederick Hart & Co. v. Recordgraph Corp., 169 F.2d 580 (Third Cir.);

Domestic and Foreign, Etc. v. Littlejohn, 165 F.2d 235 at 237.

The holding of the Ninth Circuit as to the questions of fact presented and the approval of their discussion and decision by the Trial Court is directly contrary to the rules and decisions of this Court, as well as those of other Circuits, and we respectfully submit are of such grave importance as to require the granting of certiorari under the rules of this Court.

VI.

The Moratorium Act

We respectfully submit that the treatment afforded this very important point by the Ninth Circuit is both inaccurate and without legal basis. The Congress saw fit to pass such Act, giving relief to parties in the position of petitioners; the Circuit Court directly held (R. 713-714) that such Act was applicable to this situation and then proceeded to escape its effect by holding that there were no overt acts embraced within the period of extension. **Such is an express ruling on questions of fact without an**

opportunity by petitioners to examine or cross-examine witnesses or to try out in a proper manner the overt acts.

In the Opinion (R. p. 714), the Court said:

> "* * * The only acts which appellees contend were "overt acts" occurring during this particular period were the purchase of all of appellants' borax interests and the procurement of the releases, which transactions took place in December of 1942. As we said previously, we cannot understand how these actions can logically be said to be illegal "overt acts" committed by appellees to the damage of appellants. In exchange for the sale of their proprietary interests and for the execution of the 1942 release appellants received $350,000 in cash. The complaint does not charge that the 1942 sale and release was made under duress or compulsion or was other than a voluntary transaction."

Such statement is not correct.

Here, the Court not only erroneously *picks the facts* but then proceeds to determine such facts—that the sum of $350,000 was a sufficient and proper amount to be paid petitioners for the injuries which they had suffered and that no other facts were worthy of consideration. No mention is made of the fact that the value of the property transferred under such releases exceeded some millions of dollars—instead the Ninth Circuit adopted the stated value as the real value, without evidence or proof of any kind. How could the Court possibly determine such question of fact without evidence? All of this was without an opportunity on the part of petitioners to question such facts, or add to them, arbitrarily picked by the Court; **the statement of the Court that such facts, as picked by it, were the only acts which constituted "overt acts" is error and incorrect;** the overt acts actually performed by respondents during such

period were, in part, as set forth in the complaint, Paragraphs 85 to 88, inclusive, R. 69-75, inclusive. Subdivision (e) of Par. 88 summarizes generally the overt acts performed during such period, among which were threats of defendants that the lease then in existence and held by certain of the defendants would be cancelled and returned to plaintiffs lessors, which would have resulted in great damage to lessors; lessees operated the mine covered by such lease in an improper, inefficient and incompetent manner, with the result that in 1937 a cave-in occurred with large damage to the property, and which was brought about by the improper methods by which the lessees operated the property; constant endeavors of the lessee and its attorneys to force the lessor plaintiffs to agree to the execution of a new and substituted lease or to sell all of their interests to the lessees; threatening to exhaust the property and claim the proceeds as prepaid royalty; using the mining shaft on the property for the operation of lessee's adjoining and separate property; making various other threats as to the operation and management of the property and to defeat the rights of plaintiffs lessors in said lease; further damaging the property by inefficient operations and various other activities as alleged in the complaint. **No reference of any kind was made by the lower court in its opinion as to any of such overt acts.**

Such facts cannot be brushed aside or remain unnoticed by the lower Court if petitioners' rights are to be respected —their mere appearance, remaining as they do unchallenged, immediately ousted the Trial Court from all jurisdiction to consider them if the prior decisions of this Court as to the trial of facts on motions for summary judgment are to be respected.

CONCLUSION

Very respectfully and sincerely we urge the justness of this cause and the right of petitioners under the Rules of this Court to a hearing by this Court. The confusion over the questions presented require, we again respectfully submit, a last word and concluding statement by this Court so that in dealing with these questions of the Statute of Limitations in these treble damage anti-trust cases we will have definite rules irrespective of the geographical location of the proceeding. It would seem that enough uncertainty over these questions has now come about to warrant notice of the same by this Court and the application of its wisdom thereto.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

STERLING CARR, one of the counsel for Petitioners herein, hereby certifies that the within Petition for Rehearing is presented in good faith and not for delay, and that this petition is restricted to the grounds referred to in Rule 33 of this Court.

STERLING CARR